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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 182

TEXAS STATE AFL–CIO, ANTONIO AGUILAR, JULIA AMAYA, ET AL., PETITIONERS

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL, RAYMOND F. FARRELL, COMMISSIONER OF IMMIGRATION AND NATURALIZATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS KENNEDY AND FARRELL IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 114–118, 134–135;[1] Pet. App. 23–32) is reported at 330 F. 2d 217.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1964 (R. 119), and a petition for rehearing was denied on March 18, 1964 (R. 136). The

[1] "R." refers to the joint appendix in the court of appeals which is on file with the Clerk of this Court.

petition for a writ of certiorari was filed on June 13, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners have standing to sue to compel Immigration authorities to change the status of a group of aliens who, although considered as permanent residents, are permitted to enter the United States daily and work in this country while maintaining homes in Mexico.

STATEMENT

Petitioners seek a declaratory judgment and relief in the nature of mandamus in order to revoke the status as permanent residents of a group of Mexican aliens (known as "commuting aliens")[2] who have been permitted by the Immigration authorities to enter the United States and hold down jobs in this country while maintaining their actual residence in Mexico. To grant this request would effectively bar these commuters from working in the United States while actually residing in Mexico. For, if they sought entrance as immigrants, they would be obligated each day to obtain entry visas and meet the requirements of Section 212 of the Immigration and Nationality Act, of 1952. The daily requirements would impose insuperable practical and financial burdens upon them. If, on the other hand, the commuters sought entry as

[2] In their complaint, petitioners estimated that there are in excess of 50,000 commuting aliens (R. 17). The government believes the number to be between thirty and fifty thousand (see R. 84).

non-immigrants to perform temporary services or labor, they would probably be subject to exclusion under Section 101(a)(15)(H)(ii) of the Act on the grounds that there were unemployed persons in this country capable of performing the services sought to be performed by the commuters.

The district court dismissed the complaint and the court of appeals, on the ground of lack of standing, affirmed (R. 114–118; Pet. App. 23–28; 330 F. 2d 217). The proceedings culminating in this judgment were as follows:

In October 1961 petitioners filed a complaint in the district court seeking a declaratory judgment and order in the nature of mandamus against the Attorney General and the Commissioner of Immigration and Naturalization (R. 2–23). The complaint stated that petitioners were a voluntary labor organization of Texas suing on behalf of its members and of affiliated members of organized labor, and over 180 individuals, who were residents of Texas border communities, suing for themselves and as representatives of a numerous class of persons similarly situated (R. 4–8). The complaint alleged that the Immigration and Naturalization Services had failed properly to enforce the Immigration and Nationality Act as to a group of Mexicans known as "commuting aliens." It was claimed that, in violation of the Act, these aliens had been granted permanent residence status, when, in truth, they are not entitled to such status because, although they work in this country, they actually reside in Mexico (R. 9–18); that as a consequence of this failure to enforce the Act, an abundance of

cheap labor has become available in the United States border communities producing fewer available job opportunities, unemployment, low wages, and forced migration (R. 18–19); that the individual petitioners have suffered economic hardship from unemployment (R. 19–20); and that the petitioner labor organization has suffered injury from the unemployment of its members, low wage rates, and the weakening of strikes (R. 20–21). The complaint additionally asserted that this situation has led to "animosity between the United States and its good neighbor Mexico" (R. 21). Petitioners prayed that the district court issue a judgment declaring that "commuting aliens, * * * have no legal status and are not aliens lawfully admitted for permanent residence in the United States" and that an order in the nature of mandamus issue requiring the government to cease conferring such permanent residence status upon these aliens (R. 22–23).

In answer the government stated, *inter alia,* that the alleged injury was too remote to confer standing on petitioners (R. 24–29). Attached to the answer (R. 37–41) of the intervening respondents—nineteen Mexican commuting aliens who represented themselves and other commuters (R. 30–33, 36)—were affidavits which showed that some of these aliens had been commuting between Mexico and the United States since the middle of the 1920's and that some were members of unions which were affiliated with petitioner labor organization (see R. 46, 47–48, 50, 52–53, 56–57, 63).

Cross motions for summary judgment were filed by the parties, and the respondents also filed motions to dismiss (R. 80, 81–82). Attached to the government's motion to dismiss was an affidavit, dated November 5, 1962, from Secretary of State Dean Rusk in which he stated that (R. 83):

> [T]he present practice with regard to commuters across the United States-Mexican border contributes to the friendly relations between the United States and Mexico. The Government of Mexico has also undertaken to explore with the United States Government formulas that would make it possible to find a satisfactory solution for the future to the problem which gives rise to this litigation. Negotiations looking to such a solution are presently in progress. In my judgment, a sudden termination of the commuter system as the result of a court decision would have a serious deleterious effect upon our relations with Mexico.

The Secretary further pointed out that an abrupt termination of the commuter program by judicial decree would disrupt the economic unity between contiguous communities on either side of the border, and that it could lead to "compensating steps" by Mexico resulting in economic damage to the area and could "seriously jeopardize the Alliance for Progress in Mexico, and thus in all Latin America." The Secretary further stressed that the problem has not only to do with our relations with Mexico but with Canada as well (R. 84–85).

ARGUMENT

The court of appeals, without passing on the substantive issue raised by the complaint, held that petitioners were without standing. We submit that this decision is correct and does not warrant further review by this Court.

1. Petitioners' claim is, in essence, that they are injured by competition from workers illegally admitted by the government into the country. However, it is well established that government officers may not be sued because of allegedly injurious competition, which is itself lawful, merely because the competition is the result of action by officials who allegedly exceeded their authority. See, *e.g.*, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 478–485; *Tennessee Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 137–138, 140; *Duke Power Co.* v. *Greenwood County*, 302 U.S. 485; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924 (C.A. D.C.), certiorari denied, 350 U.S. 884. See also *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 125; *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 149, 153. Petitioners have been deprived of no right belonging to them. No property has been taken from them; no contract has been violated; no tort has been committed against them; no constitutional right even conceivably belonging to them has been violated.[3]

[3] Petitioners rely (Pet. 13–14) on *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, which held that a State commission violated freedom of the press in telling book distributors that books distributed by them had been found to be obscene and that it had recommended prosecution of such distributors, without providing adequate procedures for determining whether

No provision of the Immigration and Nationality Act of 1952 even suggests that an administrative decision admitting or readmitting aliens is subject to judicial review at the behest of another private litigant. Cf. *Ferrer* v. *Fronton Exhibition Co.*, 188 F. 2d 954, 956 (C.A. 5). Indeed, in 1961, Congress amended the 1952 Act, by adding Section 106, which specifically states that it is to be "the sole and exclusive procedure" for review by an alien directly affected by a deportation order and further provides that an alien who has been ordered excluded may test that determination only by way of habeas corpus. 75 Stat. 651–653. See *Foti* v. *Immigration Service*, 375 U.S. 217. A *fortiori*, review may not be obtained by a stranger.[4]

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the books were in fact obscene. There, the Court found that the plaintiffs had standing because the State's action, if it had been private, would have been tortious and it deprived them of their own constitutional rights. *Id.* at 64–65, note 6. Here, on the other hand, the competition complained of is plainly not itself illegal or tortious; no right running to petitioners has been possibly infringed; and no constitutional rights or issues are even involved.

[4] Petitioners rely (Pet. 9–12) on *Amalgamated Meat Cutters and Butcher Workmen* v. *Rogers*, 186 F. Supp. 114 (D. D.C.), in which the Secretary of Labor had issued a certification under Section 212(a)(14) of the Act that the admission of aliens for employment at a particular company which was being struck by the plaintiff union would affect wages and working conditions of workers in the United States. The Immigration and Naturalization Service thereupon barred aliens from entering the United States for this purpose "except returning lawfully domiciled resident aliens." The district court held that the union had standing to sue to require the Attorney General to comply with the certification so as to exclude commuting aliens who, it was alleged, were being employed by the packing company as strike breakers. That case is distinguishable because petitioners are not seeking to enforce the performance of an

Congress was well aware of the possibility that the Immigration and Nationality Act might not be administered to its full satisfaction. However, it did not choose to have the public interest vindicated through suits by private litigants. Instead, it created a joint-congressional "watchdog" committee whose function it is to maintain continuous surveillance over the operation and administration of the Act and make reports and recommendations to Congress.[5] Section 401, 8 U.S.C. 1106, 66 Stat. 274–275. In short, Congress decreed that the remedy for correcting administrative inadequacies lies in corrective legislation, not in private lawsuits. See *Kansas City Power & Light Co.* v. *McKay, supra,* 225 F. 2d at 931.

Petitioners urge (Pet. 14–15) that Section 10(a) of Administrative Procedure Act, 5 U.S.C. 1009(a)—which provides for judicial review for persons "adversely affected or aggrieved" by administrative action—confers standing on them. However, the Administrative Procedure Act, while providing new remedies, did not create new rights in persons previously without standing. While *Federal Communications Com-*

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order of an executive department but instead seek to have the courts direct that such executive action be taken. Moreover, the competitive injury to the plaintiff in *Amalgamated* was far more direct and serious than that involved here (see pp. 10–11 below).

[5] Thus, the decisions in *Amalgamated* (see note 4 above) and this case have been included in a recent Congressional report and are under Congressional study. See House Committee on the Judiciary, Subcommittee No. 1, Study of Population and Immigration Problems, Administrative Presentations (III) (1963), pp. 156–160.

mission v. *Sanders Radio Station*, 309 U.S. 470, 473–477, and related cases arising under the Federal Communications Act construed similar language to confer standing, the Court there found that Congress intended competitors to bring suits in order to protect the public interest. That is a special rule applicable in a highly regulated industry endowed with particular public interest. The rule was neither based on the Administrative Procedure Act nor derived from it. Thus, those cases cannot be deemed to enlarge the reach and effect of Section 10(a) of the Act so as to make persons who disagree with any government policy "private Attorney Generals." See *Associated Industries* v. *Ickes*, 134 F. 2d 694, 704 (C.A. 2), vacated as moot, 320 U.S. 707.[6]

Even if it be assumed *arguendo* that Section 10(a) of the Administrative Procedure Act would, in certain circumstances, confer standing to challenge the admission of aliens into this country, petitioners do not have standing in the instant case. For, at the least,

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[6] The lower courts have consistently rejected such an expansive reading of Section 10(a). *Harrison-Halsted Community Group, Inc.* v. *Housing & Home Finance Agency*, 310 F. 2d 99, 104–105 (C.A. 7), certiorari denied, 373 U.S. 914; *Duba* v. *Schuetzle*, 303 F. 2d 570, 574–575 (C.A. 8); *Ove Gustavsson Contracting Co.* v. *Floete*, 278 F. 2d 912, 914 (C.A. 2), certiorari denied, 364 U.S. 894; *Kansas City Power & Light Co.* v. *McKay*, 225 F. 2d 924, 931–933 (C.A. D.C.), certiorari denied, 350 U.S. 884. A contrary ruling, relied on by petitioners (Pet. 15), *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346, 348–349 (D. D.C.), was summarily rejected by the court of appeals in *Kansas City Power & Light Co.*, *supra*, 225 F. 2d at 932.

it is essential that the injury sought to be remedied is direct and immediate rather than remote, indefinite, or speculative. See *Massachusetts* v. *Mellon,* 262 U.S. 447, 488; *Gange Lumber Co.* v. *Rowley,* 326 U.S. 295, 305; *United States Cane Sugar Refiners' Ass'n* v. *McNutt,* 138 F. 2d 116, 119–120 (C.A. 2); *Railway Express Agency* v. *Kennedy,* 189 F. 2d 801, 805 (C.A. 7), certiorari denied, 342 U.S. 830; cf. *National Coal Ass'n* v. *Federal Power Commission,* 191 F. 2d 462, 465 (C.A. D.C.).

That no direct remediable injury is alleged in this case is illustrated by contrasting the complaint with the factual situation in the *Amalgamated Meat Cutters* case discussed above (pp. 7–8, note 4). In *Amalgamated,* the striking employees and the strike-breaking commuters were in competition for the very same jobs at the struck plant at the Peyton Packing Company in El Paso, Texas. There was, accordingly, a direct relationship between the allegedly unlawful conduct of the Attorney General in admitting the commuter aliens and the resultant economic injury to the striking employees. In sharp contrast, the alleged injury suffered by petitioners here is indirect and speculative. It is nowhere shown that the commuting aliens are in direct economic competition with petitioners for particular jobs in a specified plant, community, or even industry. The individual petitioners do not reside in any specific location nor are they employed in any particular industry. On the contrary, they are scattered over five counties of Texas (R. 5–7). On the other hand, some of the commuters reside on the Canadian as well as the Mexican side of the border

and, as pointed out in the complaint, are engaged in all types of employment from being maids to construction workers (R. 18–19).

2. The essence of petitioners' complaint is that, unless the courts act to compel Immigration authorities to enforce allegedly applicable provisions of the Immigration and Nationality Act against thousands of "commuting aliens," petitioners, and those they represent, will continue to suffer economic hardship in terms of unemployment, limited job opportunities and depressed wage scales. Thus, this is not an action which seeks a remedy affecting only the government officials named as defendants or their privies. On the contrary, petitioners request that between thirty and fifty thousand commuting aliens, no matter how close their ties to this country or how long they have been employed in the United States, be deprived of their present status.

Plainly, the litigation in this case cannot determine the status of thousands of persons not parties to it. If petitioners are successful here and Immigration authorities therefore deny permanent residence status to commuting aliens, the latter may, of course, bring suit to restore their former status. Thus, petitioners are, in reality, seeking to have the commuting aliens and the government litigate their status. They plainly have no standing to do this.[7]

[7] In *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 123, an element of this Court's finding of non-justiciability was the fact that the relief sought and granted by the court of appeals went "beyond any controversy that might have existed between the complaining companies and the Government officials."

CONCLUSION

For the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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